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Supreme Court of the United States

OCTOBER TERM, 1943.

No. 1067

INDUSTRIAL ADDITION ASSOCIATION, A CORPORATION UNDER THE LAWS OF TENNESSEE, WITH PRINCIPAL OFFICE IN DYERSBURG, TENNESSEE,
PETITIONER,

VS.

COMMISSIONER OF INTERNAL REVENUE,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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COMMISSIONER OF INTERNAL REVENUE,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

To the Honorables, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

SUMMARY STATEMENT OF THE MATTERS INVOLVED.

Petitioner, Industrial Addition Association, is a corporation under various Acts of the Tennessee Legislature:

Acts of 1874, Chapter 142, as amended in 1895, Chapter 358, and 1925, Chapter 3, now appearing in the Code of Tennessee of 1932 in Sections 4146 to 4186, inclusive. Charters under this Section are organized for the general welfare of society, not individual profit. This corporation borrowed certain funds in various ways and erected houses for employees of an industrial plant to be located in the Town of Dyersburg, known as Dyersburg Cotton Products Company, and later reorganized as Dyersburg Cotton Products, Inc. Petitioner filed no returns for income taxes to the Internal Revenue Collector of the United States for the District of Tennessee. On April 16, 1940, the Internal Revenue Agent in Charge, Nashville Division, sent to Petitioner a letter claiming liability for the taxable years ending December 31, 1932, to 1936, inclusive. The aggregate deficiency claimed being $14,920.59. On July 10, 1940, Petition was filed in the Tax Court of the United States (at the time United States Board of Tax Appeals) and with certain adjustments to the amounts claimed, the decision of the Commissioner was affirmed. The question presented to the Tax Court was the claimed exemption of Petitioner from tax, under provision of Section 101(7) or 101(8) of the 1934 and 1936 Revenue Acts, and similar provision of Section 103 of the 1932 Act. On December 30, 1942, the Opinion of the Tax Court was entered sustaining the Commissioner. Decision was thereafter rendered March 12, 1943. On June 11, 1943, and within three months, Petitioner filed with the Tax Court a Petition for Review, which was addressed to, and sought review of the Tax Court's decision by, the Circuit Court of Appeals for the Sixth Circuit, the Petition being filed pursuant to U. S. C. A., Title 26, Sec. 1141.

The venue of the action is provided in Sec. 1141, U. S. C. A., Title 26, and permits review "by the Circuit Court of Appeals for the Circuit in which is located the Collector's Office to which was made the return of tax in respect of which the liability arises, or if no return was made, then by the United States Court of Appeals for the District of Columbia."

Section 1141(b)(2) provides:

> "Notwithstanding the provisions of paragraph 1, such decisions may be reviewed by any circuit court of appeals, or the United States Court of Appeals for the District of Columbia, which may be designated by the Commissioner and the taxpayer by stipulation in writing."

Taxpayer filed no return for the years in question with any Collector claiming to be exempt from this tax. On the 10th day of July, 1943, a Stipulation in writing, pursuant to the foregoing section, was entered into by the Commissioner and the Taxpayer, designating the United States Circuit Court of Appeals for the Sixth Circuit as the Circuit Court of Appeals to review the decision of the Tax Court. This Stipulation (Record pp. 97-98) contained an agreement "that Respondent's signature on this Stipulation shall not in any manner affect his right to question its timeliness and legal effect and or his right to move to dismiss Petition for Review for want of jurisdiction."

This Stipulation did not appear in the Record presented to the Sixth Circuit. An original signed copy thereof was presented, and, without objection, was ordered filed on February 17, 1944, and now appears in the Record (Record pp. 97-98) showing it was executed July 10, 1943. Respondent moved to dismiss the Petition for

Review (Record p. 97), admitting the Stipulation was entered into on July 10, 1943, with the reservation hereinabove quoted. The ground of the Motion being that the Stipulation was entered into after the expiration of the three-month period, and was therefore ineffective, and the Sixth Circuit Court was without jurisdiction to entertain the Petition for Review.

The Circuit Court of Appeals held that Section 1142 was jurisdictional and mandatory, and therefore the Stipulation of July 10, 1943, was executed after the expiration of the three-month period and was void and of no effect, and sustained the Motion to Dismiss without passing upon the merits of the case.

QUESTIONS PRESENTED AND REASONS RELIED UPON FOR ALLOWANCE OF THE WRIT.

The Opinion of the Circuit Court of Appeals is not yet reported, but appears in full in the Record page 99. *et seq.*

This Opinion and the judgment entered thereon is directly in conflict with the Opinion and Decision of the Circuit Court of Appeals for the Fifth Circuit in *Wegener v. Commissioner*, 119 F. 2d 49.

The question being an important one, and there being a direct conflict between two of the Circuit Courts of Appeal, the matter is brought here for determination by this Court.

There is annexed hereto and presented herewith, as a part of this Petition, a certified copy of the entire Record in this cause in the Circuit Court of Appeals for the Sixth Circuit, Specification of Error and Brief and Argument, stating the reasons why Petitioner alleges the decision and judgment of the Circuit Court of Appeals for the Sixth Circuit is erroneous and should be reversed.

and it is respectfully requested that the certified copy of the Record, Specification of Error, Brief and Argument, be considered in connection with, and as a part of this Petition for the purpose of testing the correctness of the ruling complained of.

STATEMENT OF JURISDICTION.

The jurisdiction of this Court is under Judicial Code, Sections 204 and 262 as Amended, U. S. C. A., Title 28, Sec. 347.

PRAYER FOR WRIT.

Petitioner respectfully prays that a Writ of Certiorari be issued out of and under the seal of this Honorable Court, directed to the Circuit Court of Appeals for the Sixth Circuit, commanding that Court to certify and send to this Court for its review and determination on a day certain to be therein named, a full and complete Transcript of the Record and all proceedings in the case, cited on its Docket 9629, entitled Industrial Addition Association, Petitioner, vs. Commissioner of Internal Revenue, Respondent, and that said judgment be reversed and your Petitioner have such other and further relief in the premises as to this Honorable Court may seem mete and just.

Respectfully submitted,

F. A. BERRY,
Attorney for Petitioner.

BASS, BERRY & SIMS,
Of Counsel.

Supreme Court of the United States

OCTOBER TERM, 1943.

No.

INDUSTRIAL ADDITION ASSOCIATION, A CORPORATION UNDER THE LAWS OF TENNESSEE, WITH PRINCIPAL OFFICE IN DYERSBURG, TENNESSEE,
PETITIONER.

VS.

COMMISSIONER OF INTERNAL REVENUE,
RESPONDENT.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

JURISDICTION.

The Opinion of the United States Circuit Court of Appeals for the Sixth Circuit in this cause has not yet been officially reported, but appears in the Record at page 99. The Opinion and judgment of the Circuit Court of

Appeals were handed down and entered on March 27, 1944.

II.

STATEMENT OF THE CASE.

The facts have been succinctly and substantially stated in the Petition, and may be shortly restated as follows:

The Petitioner on June 11, 1943, filed in the Circuit Court of Appeals for the Sixth Circuit a Petition to Review a decision of the Tax Court of the United States entered March 12, 1943. This was within the three-month period.

No tax return to any Collector of Internal Revenue had been filed by Petitioner in respect of which the liability claimed by the Commissioner, arises.

U. S. C. A., Title 26, Sec. 1141, provides that the venue of this Appeal is in the Court of Appeals for the District of Columbia, unless and except another Circuit Court of Appeals be designated by the Commissioner and the Taxpayer by stipulation in writing. This designation, in conformity with the Statute, was entered into on July 10, 1943, but after the expiration of the three-month period. The question presented here is whether or not this Stipulation, entered into while this Appeal was pending in the Court of Appeals for the Sixth Circuit and before dismissal, clothed the Court of Appeals for the Sixth Circuit with jurisdiction and venue to hear and determine this case on its merits, or whether the Taxpayer is now precluded from asking any review of its case.

III.

SPECIFICATION OF ERROR.

1. The United States Circuit Court of Appeals for the Sixth Circuit erred in holding that the Stipulation in writing entered into on July 10, 1943, and filed in this cause, designating the United States District Court for the Sixth Circuit to review the decision of the Tax Court of the United States in this cause was void and of no effect, in that it was executed more than three months from the date of the entry of the decision of the Tax Court.

2. The United States Circuit Court of Appeal for the Sixth Circuit erred in holding that the Statute of the United States, U. S. C. A., Title 26, Sec. 1141, permitting a stipulation in writing to be filed designating the Court of Appeals of Taxpayer's domicile to review a decision of the Tax Court of the United States, required such stipulation to be entered into and filed within three months after the entry of the decision of the Tax Court.

IV.

ARGUMENT.

Petitioner in this cause alleges that it is a corporation organized for general welfare and not for profit and is therefore not liable for the taxes assessed against it by the Commissioner. The cause is not now before this Court upon the merits of this cause, but only upon the question as to whether or not the venue of this cause was properly vested in the United States Circuit Court of Appeals for the Sixth Circuit by reason of the Stipulation in writing entered into between the Commissioner and Petitioner. The merits of the cause have not been passed upon, but only the question of venue.

The sole office of the Petitioner is in Dyersburg, Tennessee, a small town in the Western part of that State. All investigations made by the Collector were in the State of Tennessee, and the hearing before the Tax Court was in Memphis, Tennessee. By reason of Taxpayer's failure to file a return it would seem unjust and unreasonable to compel this small company, virtually without resources, to journey from Tennessee to the District of Columbia in order to make out its Appeal and present its case. Evidently, to correct this injustice, the Congress of the United States passed the Act relied upon here. U. S. C. A., Title 26, Sec. 1141, Subsec. (b)(2), provides that the Commissioner and the Taxpayer, by Stipulation in writing, may designate any Circuit Court of Appeals to review a decision of the Tax Court.

The Commissioner is given discretion as to whether he will enter into a Stipulation. Remedial Statutes of this kind always presume that the official, clothed with power to consent, will exercise his discretion fairly and reasonably, without abusing the confidence reposed in

by the Government, and with equal justice to the [illegible] of the Taxpayer.

The logical Court to which the Petition for Review should be first addressed is the Sixth Circuit Court of Appeals which is located in the district in which the office of the Collector who conducted all proceedings is located and in which the sole and only office of Taxpayer is located. Evidently, the Commissioner concurred in this view of the matter and on request, signed a Stipulation in writing conferring venue on the Circuit Court of Appeals for the Sixth Circuit. At the time, only one case had decided the issue squarely, and this case confirmed the authority of the Commissioner to consent to venue after the expiration of the three-month period. Petitioner continued to pursue its remedies and to incur expense after the Petition was filed in the Sixth Circuit, relying upon *Wegener* v. *Commissioner*, (5th Circuit) decided April 7, 1941, 119 F. 2d 49.

In the Wegener case it was conceded the Appeal should properly have been taken to the Tenth Circuit, but was erroneously taken to the Fifth Circuit. In that case, as in the case at bar, a Stipulation in writing, pursuant to the Statute, was necessary to give the Reviewing Court venue of the case. Before hearing of the case and before its dismissal, but after the expiration of the three-month period, a Stipulation in writing, practically identical with the one here relied upon by this Petitioner, was signed by the Commissioner and the Taxpayer, designating the Court of Appeals for the Fifth Circuit as the Court to review the decision. In that case, as in the case at bar, a reservation was made permitting the Commissioner to move to dismiss the case for failure to file, or enter into a stipulation in writing, within a period of three months after the decision of the Tax Court was entered.

In a case on this Motion, the Court of Appeals for the Fifth Circuit said in part:

> "We are clear that consent was given, with authority, and that it was effective to confer jurisdiction upon this Court as if it had been given before the Petition for Review was filed."

In the Wegener case the Commissioner contended that the right of the Commissioner to consent is limited to a three-month period and having been given after the expiration of that period was ineffective. An examination of the Statute will show no such limitation as to the time of consent, and the Court in the Wegener case simply states that it refuses to write such a limitation into the Statute.

In *Spring Canon Coal Co. v. Commissioner*, 23 F. 2d 104 (Fourth Circuit) decided February 10, 1930, the Statute under consideration is considered and the Court there holds that the Statute is remedial in permitting by consent, the Circuit Court of Taxpayer's domicile to be vested with venue to hear cases such as this. The Court states that the Statute is not so broad as to permit any court for and reason to be selected.

In *Massachusetts F. & M. Ins. Co. v. Commissioner*, 42 F. 2d 189 (Second Circuit), decided June 9, 1930, it is held that this Statute only permits the Circuit Court in that District in which Taxpayer has his domicile to be designated; and that the choice of courts was not unlimited. This Court reviewed the proceedings both in the House and Senate regarding the Statute.

In the case at bar, the Court of Appeals first determines that the Petition for Review must be filed within the three-month period, and in a court in which jurisdiction and venue are conclusively vested at the time of

when the three-month period actually expired, the Court of Appeals for the Sixth Circuit did not have jurisdiction and venue for the reason that the Stipulation designating that Court had not then been entered into or filed. In other words, the Sixth Circuit takes a position directly opposed to the position of the Fifth Circuit and writes a limitation of time into the Statute and holds explicitly that unless the court in which the Petition is filed actually has at the time of filing, or, at any rate, within the three-month period, complete jurisdiction, either by direction of the Statute or the prior execution of a Stipulation, that the court is without jurisdiction, and, therefore, the Petition should be dismissed on Motion. The case of *Massachusetts F. & M. Ins. Co. v. Commissioner, supra*, is referred to, and also the case of *Nash-Breyer Motor Co.* v. *Commissioner*, (2nd Circuit) 42 F. 2d 192, which was dismissed on the authority of the first named case. The latter case was taken to this Court by certiorari, which was granted, the case set down for Argument, and it was affirmed by Opinion in 283 U. S. 835, 75 L. Ed. 1180.

This Court in the Nash-Breyer case refers to the question of venue and disposes of an artificial choice of venue, saying this was never meant; and among other expressions, says

> "Venue of the Federal Courts generally turns upon the geographical location of the parties and is never within their exclusive control."

And further says,

> "'The Circuit Court of Appeals for the Circuit' —seem to refer, not to the court of appeals for any circuit, but to some particular circuit court of appeals previously described, necessarily that one which could have entertained the petition, under (a), (b) or (c), of an agreement under (d)."

In providing for Appeals to the District of Columbia, we respectfully insist that Congress did not mean to deprive a Taxpayer of right to appeal to courts of the circuit in which he resided. The evil sought to be remedied is to fix venue where it is uncertain and cannot be readily determined. Many persons are assessed for taxes, who apparently have no fixed domicile, and consequently the court to which they should appeal is uncertain. In such instances Congress has provided an arbitrary court. In cases, however, where the Taxpayer has a fixed domicile there appears no intention to deprive Taxpayer of the right to appeal to courts within the District of domicile. This seems to be clear. There is an incomplete and inchoate venue and jurisdiction in courts of taxpayer's domicile where there is a fixed domicile, even though no returns have been filed. This venue and jurisdiction becomes complete and definite, as well as exclusive, by filing a Stipulation, as was done here. At the time taxpayer filed Appeal in the Sixth Circuit the only decision on this point was *Wegener* v. *Commissioner*, *supra*. To now deny Taxpayer the right of review of this case on the merits would seem both unfair and an injury not contemplated by the Congressional Act, and not justified by the language of the Act. To deny Petitioner relief is to write a time limitation in the Act not written there by Congress.

We respectfully submit that the Court of Appeals for the Sixth Circuit should be reversed and the cause remanded for further proceedings on the merits.

Respectfully submitted,

F. A. Berry,

Attorney for Petitioner.

Bass, Berry & Sims,